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Summer Harvest Sdn Bhd v Michael Chang Tze Chon (suing as executor for the estate of Chan Chow Kong @ Chan Chau Ko, deceased) & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02(NCVC)(W)-1965–12 OF 2015
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
17 MARCH 2017

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Contract — Joint venture — Joint venture agreement ('JVA') — Land owners entered into JVA with developer to develop land into housing estate — JVA provided that land owners would get certain number of houses under the development but number would be proportionately reduced if part of land was acquired by government — Whether land owners were given more houses than they were entitled to as the distribution formula was based on full acreage of the land without taking into account its partial acquisition — Whether developer entitled to set off value of extra houses land owners had obtained against the damages it had to pay them for committing breach of JVA

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The owners (since deceased) of an 80.56 acre of land entered into a joint venture agreement ('JVA') with the appellant developer to develop the land into a housing estate. The JVA provided that the land owners would be given an agreed number of houses in the development. By three subsequent variation agreements to the JVA between the parties and/or the respondents, as the beneficiaries of the deceased, the number and type of houses the land owners would get was varied. When the appellant submitted its development plan to the local authority for approval, it was informed that 7.98 acres of the land would be acquired by the government for the construction of a highway. Following the conclusion of the development of the land, the respondents sued the appellant for various reliefs for breaching the JVA, notably: (a) that the appellant had failed to give them ten units of low-cost flats under phase 1 as agreed (for which RM700,000 in damages was claimed); and (b) that instead of building 74 townhouses under phase 4 of the JVA the appellant had decided on its own to build 45 double-storey terrace houses and two semi-detached houses and sold 44 of those double-storey terrace houses to third parties without the respondents' consent (for which RM5,640,085.35 in damages, excluding interest, was claimed). In reply, the appellant pleaded that as the number of houses the respondents were entitled to pursuant to the JVA and the variation agreements was based on the total land area of 80.56 acres, without taking into account the 7.98 acres that had been compulsorily acquired, the respondents had obtained 7.7298 more houses than they were entitled to. The appellant

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relied upon cl 21(c)(i) of the JVA which provided for a proportionate reduction in the respondents' entitlement if part of the land was acquired by the government. The appellant pleaded that it was entitled to set off against the respondents' claim a sum of RM1,144,847.66 being the value of the extra 7.7298 units that they had been given. The High Court allowed, inter alia, the respondents' claim for RM5,640,085.35 in damages for their share of the double-storey houses under phase 4 and awarded them RM50,000 in aggravated damages for the appellant's wilful breach of contract. Instead of awarding damages for the appellant's failure to deliver the agreed ten units of low-cost flats under phase 1, the trial court ordered the appellant to build and deliver them to the respondents within three years of the date of judgment failing which the land on which those units were to be built was to be returned to the respondents. The trial court failed to consider and make a decision on the appellant's claim for set off. The appellant's instant appeal against the High Court's decision was confined to: (i) the failure to deliver the ten units of low-cost flats under phase 1; and (ii) the decision to build 45 units of double-storey terrace houses and two semi-detached houses in the place of 74 low-cost townhouses under phase 4.

Held, allowing the appellant to set off the sum of RM1,144,847.66 against the principal sum of RM5,640,085.35 awarded by the High Court as damages to the respondents and affirming the decision of the High Court in all other respects:

(1) The appellant's plea of set off was premised on cl 21(c)(i) of the JVA (that provided for a proportionate reduction in the respondents' lots in the event of partial acquisition of the land by the government). Although the layout plans subsequent to the first plan of June 1996 excluded the acquired land from the development, and the parties had conducted their mutual affairs and dealings on the basis that the land available for development was only 72.58 acres, there was no evidence to indicate conclusively that the respondents' entitlement, which was premised on a development area of 80.56 acres, had been reduced proportionately. Accordingly, there was merit in the appellant's claim for set off in the sum of RM1,144,847.66 (see paras 37–38 & 41).

(2) The High Court's award of RM50,000 for aggravated damages was very reasonable in view of the fact the appellant had wilfully breached the terms of the JVA in not only building the 45 units of double-storey terrace houses in place of the townhouses, but in selling them to third parties without any regard to the respondents' entitlement as owners of the land (see para 39).

(3) Save for the issue of the plea of set off, the trial judge's decision on all the

A other issues did not err in law or on the facts (see para 40).

[Bahasa Malaysia summary

Pemilik-pemilik (si mati) tanah seluas 80.56 ekar memasuki perjanjian usahasama ('PUS') dengan perayu pemaju untuk memajukan tanah tersebut B kepada estet perumahan. PUS tersebut memperuntukkan bahawa pemilik tanah akan diberikan beberapa buah rumah yang dipersetujui di dalam pembangunan tersebut. Melalui perjanjian perubahan kemudiannya kepada PUS tersebut di antara pihak-pihak dan/atau responden-responden, sebagai benefisiari si mati, beberapa dan jenis rumah yang akan diperolehi diubah. C Apabila perayu menyerahkan pelan pembangunannya kepada pihak berkuasa tempatan untuk kelulusan, ia diberitahu bahawa 7.98 ekar tanah akan diambil alih oleh kerajaan untuk pembinaan lebuh raya. Berikutan penyiapan pembangunan tanah, responden-responden menyaman perayu untuk pelbagai relif kerana memungkiri PUS tersebut, terutamanya: (a) bahawa perayu telah D gagal untuk memberi kepada mereka sepuluh unit rumah pangsa kos murah di bawah fasa 1 seperti yang dipersetujui (yang mana ganti rugi sebanyak RM700,000 dituntut); dan (b) bahawa sepatutnya membina 74 buah rumah bandar di bawah fasa 4 PUS tersebut, perayu telah memutuskan dengan sendirinya untuk membina 45 rumah teres dua tingkat dan dua buah rumah E berkembar dan menjual 44 rumah teres dua tingkat tersebut kepada pihak ketiga tanpa persetujuan responden-responden (yang mana ganti rugi sebanyak RM5,640,085.35 tidak termasuk faedah dituntut). Dalam menjawab, perayu merayu bahawa memandangkan responden-responden berhak kepada beberapa buah rumah berikutan PUS tersebut dan perjanjian F perubahan adalah berdasarkan ke atas jumlah kawasan tanah 80.56 ekar, tanpa mengambil kira 7.98 ekar yang telah diambil alih secara wajib, responden-responden telah memperolehi lebih 7.7298 rumah daripada yang mereka berhak. Perayu bergantung ke atas klausa 21(c)(i) PUS yang memperuntukkan bagi pengurangan bersekadar di dalam hak G responden-responden jika bahagian tanah tersebut diambil alih oleh kerajaan. Perayu merayu bahawa ia berhak untuk *set off* terhadap tuntutan responden-responden sebanyak RM1,144,847.66 sebagai nilai tambahan 7.7298 unit yang telah diberi. Mahkamah Tinggi membenarkan, antara lain, tuntutan responden-responden untuk ganti rugi sebanyak RM5,640,085.35 H bagi syer mereka terhadap rumah-rumah dua tingkat di bawah fasa 4 dan mengawardkan mereka RM50,000 ganti rugi tambahan untuk pelanggaran kontrak yang disengajakan oleh perayu. Mahkamah perbicaraan sepatutnya mengawardkan ganti rugi untuk kegagalan perayu menyerahkan sepuluh unit rumah pangsa kos murah yang dipersetujui di bawah fasa 1 tetapi I memerintahkan perayu untuk membina dan menyerahkannya kepada responden-responden dalam masa tiga tahun dari tarikh penghakiman jika gagal tanah di atas mana unit-unit tersebut dibina dikembalikan kepada responden-responden. Mahkamah perbicaraan gagal untuk mempertimbangkan dan membuat keputusan ke atas tuntutan perayu untuk

set off. Rayuan perayu ini terhadap keputusan Mahkamah Tinggi yang terhad kepada: (i) kegagalan untuk menyerahkan sepuluh unit rumah pangsa kos murah di bawah fasa 1; dan (ii) keputusan untuk membina 45 unit rumah teres dua tingkat dan dua rumah berkembar sebagai ganti 74 rumah bandar kos murah di bawah fasa 4.

Diputuskan, membenarkan perayu untuk *set off* jumlah sebanyak RM1,144,847.66 terhadap jumlah utama sebanyak RM5,640,085.35 diawardkan oleh Mahkamah Tinggi sebagai ganti rugi kepada responden-responden dan mengesahkan keputusan Mahkamah Tinggi di dalam semua aspeks lain:

(1) Rayuan *set off* perayu adalah didasarkan atas klausa 21(c)(i) PUS tersebut (yang memperuntukkan untuk pengurangan bersekadar di dalam lot-lot responden-responden sekiranya pengambilan alih sebahagian tanah oleh kerajaan). Walaupun pelan susun atur selepas pelan pertama Jun 1996 mengecualikan tanah yang diambil alih daripada pembangunan, dan pihak-pihak telah menjalankan urusan bersama dan pengendalian mereka atas dasar bahawa tanah yang ada untuk pembangunan hanya 72.58 ekar, tidak terdapat keterangan untuk menunjukkan secara konlusif bahawa hak responden-responden, yang mana berdasarkan kawasan pembangunan sebanyak 80.56 ekar, telah dikurangkan secara bersekadar. Oleh itu, terdapat merit di dalam tuntutan perayu untuk *set off* dalam jumlah RM1,144,847.66 (lihat perenggan 37, 38 & 41).

(2) Award Mahkamah Tinggi sebanyak RM50,000 untuk ganti rugi tambahan adalah munasabah mengambil kira fakta perayu telah melanggar dengan sengaja terma-terma PUS bukan sahaja membina rumah-rumah teres 45 unit sebagai ganti rumah bandar, tetapi menjualnya kepada pihak ketiga tanpa mengambil kira hak responden-responden sebagai pemilik tanah tersebut (lihat perenggan 39).

(3) Kecuali isu rayuan *set off*, keputusan hakim perbicaraan ke atas kesemua isu lain tidak salah dari segi undang-undang atau atas fakta (lihat perenggan 40).]

Notes

For cases on joint venture agreement, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 5911–5917.

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidazion) v Texas Commerce International Bank Ltd [1981] 3 All ER 577, CA (refd)

Blue Haven Enterprises Ltd v Tully and another [2006] UKPC 17, PC (refd)

A *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, FC (refd)
Gloyne v Richardson and another [2001] EWCA Civ 716, CA (refd)
JS Bloor Ltd v Pavillion Developments Ltd [2008] All ER (D) 381 (Apr); [2008] EWHC 724 (TCC), QBD (refd)

B **Legislation referred to**

Land Acquisition Act 1960

C **Appeal from:** Suit No 22NCVC-66–10 of 2014 (High Court, Seremban)

Malik Imtiaz (S Raven, Surendra Anand and Siti Nur Amirah Aqilah bt Adzman with him) (S Ravenesan) for the appellants.
Manian Raju (Pung Jenn Jiang and Elizabeth Low with him) (Krishna Dallumah, Manian and Indran) for the respondents.

D **Idrus Harun JCA (delivering judgment of the court):**

INTRODUCTION

E **[1]** This is an appeal against the decision of the learned High Court judge given on 22 October 2015 in allowing the respondents' claim against the appellant. The matter concerns a joint venture agreement ('the JVA') between the appellant and the respondents dated 7 November 1995, by which the
F appellant was to develop the respondents' land held under Grant 2960 Lot No 363, Mukim of Seremban, Negeri Sembilan measuring 80.56 acres ('the said land'), into a housing estate named Taman Coral Heights ('the development'). The development was to consist of four separate phases and, as consideration, the respondents were to be given an agreed number of low cost
G and medium cost houses.

THE CLAIM

[2] Chan Chow Kong (deceased) and Chang Chong Heng (deceased) were
H the registered co-proprietors of the said land. On 7 November 1995 both of them entered into the JVA with the appellant to develop the said land into a housing estate. They had also executed a power of attorney on the same day to give effect to the JVA. As consideration, Chan Chow Kong and Chang Chong Heng would, pursuant to cl 2 of the JVA, be given 200 units of single storey
I terrace houses which were spread across phases 1–4 to be made up and delivered to them as follows:

(a) phase 1: 30 units of single storey medium cost houses and ten units of single storey low cost houses;

(b) phase 2: 50 units of single storey medium cost houses and ten units of single storey low cost houses;

(c) phase 3: 50 units of single storey medium cost houses and ten units of single storey low cost houses; and

(d) phase 4: 30 units of single storey medium cost houses and ten units of single storey low cost houses.

These houses were required to be delivered by the appellant to Chan Chow Kong and Chang Chong Heng within three years from the commencement of each phase of the development. Following the conclusion of the JVA, the appellant submitted a layout plan in June 1996 to Majlis Perbandaran Seremban for the proposed development of the said land which was approved subject to the condition that the appellant would have to take into account the intended acquisition of part of the said land for the construction of Kajang-Seremban Highway ('LEKAS Highway') measuring about 7.98 acres. These facts were not disputed.

[3] By a supplementary agreement dated 15 May 2000 entered into by the respondents and Chan Chow Kong with the appellant, the parties agreed to vary the above consideration by amending cl 2 of the JVA in the following manner:

(a) phase 1: ten units of double storey intermediate terrace houses measuring 20 ft x 60 ft;

15 units of double storey intermediate terrace houses measuring 22 ft x 70 ft;

10 units of low cost flats with two units from each floor;

(b) phase 2: 16 units of double storey intermediate terrace houses measuring 22 ft x 70 ft;

(c) phase 3: 22 units of double storey intermediate terrace houses measuring 22 ft x 70 ft; and

(d) phase 4: 23 units of single storey intermediate medium cost terrace measuring 20 ft by 60 ft; and 26 units of low cost single storey intermediate terrace houses measuring 20 ft x 55 ft.

[4] Further, vide the appellant's letter dated 16 October 2001, both parties agreed to vary the JVA in connection with the consideration for the respondents which were provided in the following terms:

(a) phase 1: ten units of double storey intermediate terrace houses measuring 20 ft x 60 ft;

15 units of double storey intermediate terrace houses measuring 22 ft x

A 70 ft;
ten units of low cost flats with two units from each floor;

(b) phase 2: 16 units of double storey intermediate terrace houses measuring 22 ft x 70 ft;

B (c) phase 3: 22 units of double storey intermediate terrace houses measuring 22 ft x 70 ft; and

(d) phase 4: 23 units of single storey medium cost terrace houses; 15 units of intermediate ground floor town houses measuring 20 ft x 60 ft;

C 15 units of intermediate first floor town houses measuring 20 ft x 60 ft.

[5] By another letter dated 9 June 2003 issued by the appellant, both parties further agreed to make a final variation to the JVA so that the respondents' entitlement would be as follows:

D (a) phase 1: ten units of double storey intermediate terrace houses measuring 20 ft x 60 ft;
15 units of double storey intermediate terrace houses measuring 22 ft x 70 ft;

E ten units of low cost flats with two units from each floor;

(b) phase 2: 16 units of double storey intermediate terrace houses measuring 22 ft x 70 ft;

(c) phase 3: 22 units of double storey intermediate terrace houses measuring

F 22 ft x 70 ft; and

(d) phase 4: 15 units of double storey medium cost terrace houses measuring 20 ft x 60 ft;
14 units of intermediate ground floor town houses measuring 24 ft x 60 ft; and

G 15 units of first floor intermediate town houses measuring 24 ft x 60 ft.

[6] Chang Chong Heng died on 10 April 1997 and his 3/8 undivided shares in the said land was transferred to the beneficiaries of his will namely the

H first, second and third respondents whilst the fourth respondent and one Yong Sau Lan were appointed as the executors of the will.

[7] It was the respondents' pleaded case that the development was completed by the appellant circa 2009, however the appellant only delivered 78

I units of double storey intermediate terrace houses to the respondents.

[8] The issue central to the respondents' claim in the High Court involved the alleged failure on the part of the appellant to comply with the JVA. The claim centers on three primary complaints:

(a) that the appellant had failed to surrender the issue documents of titles to 47 units out of the 78 units of the double storey intermediate terrace houses, these units being in phases 1–4. Vacant possession of these units had been given to the respondents;

(b) that the appellant had failed to give the respondents titles to, and vacant possession of, ten units of low cost flats in phase 1 as a result of which the respondents suffered damage and loss amounting to RM700,000; and

(c) that the appellant had, in breach of the JVA, built 45 units of double storey terrace houses and two units of semi-detached houses instead of 74 units of town houses in phase 4, and had thereby unjustly enriched itself at the expense of the respondents. The respondents were entitled to at least 17 of the 45 double storey terrace houses and one semi-detached house built in the area earmarked for the intermediate town houses and therefore the failure by the appellant to deliver the same had caused the respondents to suffer losses in the sum of RM7,289,132.

[9] Premised on the complaints to the effect we have indicated earlier, the reliefs sought by the respondents are stated as follows:

(a) that the appellant deliver the issue documents of title in respect of the 47 units of double storey intermediate terrace houses to the appellant;

(b) an order that the appellant deliver 17 units of double storey terrace houses and one unit of semi-detached house together with the issue documents of title;

(c) that, alternatively, the sum of RM7,289,132 as damages and losses suffered by the respondents when the appellant built the 45 units of double storey terrace houses and one unit of semi-detached house on the area designated for intermediate town houses;

(d) the sum of RM700,000 as damages and losses suffered by the respondent as a result of the failure by the appellant to deliver ten units of low cost flats;

(e) a declaration that the power of attorney dated 7 November 1995 is revoked;

(f) the appellant is restrained from commencing the development of phase 5 until final disposal of this case;

(g) specific performance of the JVA and in lieu thereof, general damages for breach of contract by the appellant and aggravated damages; and

(h) interest and costs.

A DEFENCE, SET OFF AND COUNTERCLAIM

[10] In its defence, the appellant pleaded that the said land measured 80.56 acres and this was the main term of the JVA. Therefore, the thrust of the appellant's defence was that the appellant's entitlement to the units of houses pursuant to the JVA, the supplementary agreement dated 15 May 2000, the letters of variation dated 16 October 2001 and 9 June 2003 was based on the total land area of 80.56 acres prior to acquisition of part of the said land. On 6 November 2004, 3.2997 hectares (7.98 acres) out of 32.6024 hectares (80.56 acres) had been acquired by the State Authority. The appellant asserted that in light of the land acquisition, the units of houses to be given to the respondents should be reduced proportionately by the ratio of 9.91% (7.98 acres ÷ 80.56 acres x 100%) or 7.7298 units of double storey terrace houses. Following the compulsory acquisition of part of the said land, the respondents received from the appellant units of houses based on the total land area of 80.56 acres with an excess value of RM1,144,847.66.

[11] The appellant had also denied that it had breached the JVA when it proceeded to build 45 units of double storey terrace houses and two units of semi-detached houses as the respondents had been informed. The appellant asserted that the respondents' claim for 17 units of double storey terrace houses or alternatively the sum of RM7,289,132 as damages did not take into account the acquisition of 7.98 acres by the state authority. Similarly, as regards the respondents' claim for ten units of low cost flats, the appellant alleged that it was based on the development of 80.56 acres not 72.58 acres after the land acquisition. The appellant therefore pleaded for a set off sum of RM1,144,847.66 for the 7.7298 units that were over-delivered following the land acquisition in question.

[12] Additionally, the appellant counterclaimed for the sum of RM7,440,000 premised on its assertion that the variations of the JVA had given the respondents a windfall as the houses had been upgraded without the respondent having to bear the cost of building them. It is to be observed, however, that at the commencement of the trial, the appellant withdrew paras 26 and 27 of the counterclaim.

THE HIGH COURT'S DECISION

[13] The learned Judge in the court below found for the respondents on the three primary complaints and entered judgment in the respondents' favour which in summary were as follows:

(a) an order that the appellant do pay the respondents damages in the sum of RM5,640,085.35 together with interest of 5% from date of

completion of the houses that is 25 April 2010 until the date of judgment for the respondents' share of the double storey terrace houses in phase 4;

(b) an order that the appellant do deliver issue documents of title for 47 units of double storey terrace houses under phases 1–4 within seven days from the date of the judgment;

(c) an order that the appellant do deliver to the respondents 1/18th of the number of units that would be built by the appellant on the land meant for low cost flats within three years from the date of the judgment failing which the appellant should deliver the land meant for the low cost flats to the respondents after the three years period had lapsed;

(d) an order that the appellant do pay the respondent RM50,000 being aggravated damages for wilful breach of contract;

(e) an order that the appellant do pay costs of this action in the sum of RM50,000 to the respondents;

(f) an order that the appellant's counterclaim was dismissed with costs of RM10,000; and

(g) an order that the appellant do pay interest of 5% on the sums in paras (a), (d), (e) and (f) from the date of the judgment until full realisation.

THE APPEAL

[14] In its written submission, the appellant, at the outset, stated that it would comply with the order of the High Court in para (b) above and that it only wished to pursue this appeal in respect of the respondents' second and third complaints viz:

(a) that the appellant had failed to give the respondents titles to, and vacant possession of ten units of low cost flats in phase 1; and

(b) that the appellant had, in breach of the JVA, built 45 units of double storey terrace houses instead of 74 units of low cost town-houses in phase 4, and had thereby unjustly enriched itself at the expense of the respondents.

The issues on which the appeal turns therefore are confined solely to the above two complaints on which the respondents' claim is premised.

OUR DELIBERATION AND DECISION

[15] It is the appellant's case that the parties intended the JVA and the supplementary agreement to be performed on the footing that the entitlement

of the respondents was premised on a development area of 80.56 acres. While this was the position that the appellant had taken in its defence, we would observe that the appellant at the same time had also acknowledged in cl 21 of the JVA that it was of critical significance that the JVA anticipated the possibility of an acquisition of the whole or part of the said land. That clause contemplated a proportionate reduction of the respondents' entitlement by reference to the reduced land area post-acquisition. The said clause provides:

> (c) If the acquisition of the Land by the Government is of part of the said Land the Developer shall then decide as to whether to continue with the housing project or to terminate it, depending upon the feasibility thereof:
>
> (i) In the event that the Developer intends to proceed with the Agreement then the Owners lots shall be proportionately decreased; and the Developer shall be entitled to the acquisition sum awarded in accordance with Clause 21(b)(i) and (ii).

[16] Therefore, the only point of importance that has emerged from the above clause is whether the appellant knew of the intended acquisition of part of the said land. It would seem that it is the appellant's case that they did not have knowledge of the intended acquisition. Thus, the appellant contended that when the state authority acquired 7.98 acres from the said land on 23 June 2003, the entitlement of the respondents was to be proportionately reduced. However, the irrefragable facts as it was obvious to us was that the appellant knew as early as January 1998 that the state government intended to acquire 7.98 acres of land being part of the said land for the construction of the LEKAS Highway. A letter issued by Majlis Perbandaran Seremban on 5 January 1998 and copied to the appellant was sufficient to support our finding in this regard (exh P2). The said letter which was written to AZ-A, Planning and Development Service Sdn Bhd stated:

> Permohonan ini [Permohonan untuk tukar syarat dan pecah sempadan Lot 363] telah dibentangkan di dalam Mesyuarat Jawatankuasa Teknikal II, Majlis Perbandaran Seremban pada 24.12.1997. Pihak Majlis mengesyorkan permohonan tersebut diluluskan dengan syarat mengemukakan pelan pindaan terbaharu dengan mengambil kira kedudukan lebuhraya Kajang Seremban di atas lot berkenaan.

In fact, the appellant's then solicitors, Messrs Toh Chin & Co vide letter dated 21 December 1998 had informed the respondents, inter alia, the following:

> ... and due to the proposed acquisition of the said land, the application has been deferred due to amendment to be made on the layout plans ...

[17] A question had thus arisen following the land acquisition in question, which was whether the layout plans were mounted on 72.58 acres or the whole of the said land measuring 80.56 acres. The first layout plan dated June 1996

which was submitted to Majlis Perbandaran Seremban encompassed the whole area of 80.56 acres of the said land. However, the incontrovertible proof revealed that after the aforesaid letter was issued by Majlis Perbandaran Seremban and copied and sent to the appellant, all subsequent layout plans dated 23 April 1999, 13 April 2000, 20 February 2003 and 25 June 2012 respectively which were prepared on the instructions of the appellant, excluded precisely an area of 7.98 acres from the development plan. The evidence of DW2 elicited during cross-examination supports this conclusion when he agreed that as early as 5 September 1998, Majlis Perbandaran Seremban had given notice to the appellant that the first layout plan prepared in 1996 had to be amended to take into account the intended acquisition by the state authority for the LEKAS Highway of the 7.98 acres.

[18] The acquisition by the state authority of the exact location and area, measuring 7.98 acres which was excluded by the appellant as instructed by Majlis Perbandaran Seremban was subsequently formalised by the issuance of Borang K pursuant to the Land Acquisition Act 1960. Against the weight of the aforesaid irrefutable documentary evidence, it is undoubtedly clear that as of January 1998 the appellant was aware of the proposed acquisition of the said area of 7.98 acres and that the layout plans were not based on the whole area of 80.56 acres, it was instead mounted on the remaining land measuring 72.58 acres. The contemporaneous documents aforementioned and the conduct of the appellant in setting aside exactly 7.98 acres for the LEKAS Highway at the designated location speak for themselves.

[19] The respondents and the appellant relied on the JVA, the subsequent supplementary agreement dated 15 May 2000 and the first and second variation letters dated 16 October 2001 and 9 June 2003 respectively. Together and collectively we shall refer to these documents as the 'contract'. Until December 2011, for about 14 years the parties had conducted themselves on the basis in accordance with the contract and that the layout plan was mounted on 72.58 acres, after the intended acquisition of 7.98 acres by the state authority for the LEKAS Highway was made known to the appellant as early as January 1998. The pertinent point that has arisen in consequence of the conduct of both parties in regulating their mutual affairs or their subsequent dealings, is whether the appellant can now say that the land available for the development is 80.56 acres. In *Amalgamated Investment & Property Co Ltd (in liquidazion) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, Lord Denning MR at p 584 had this to say:

> If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if

A they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

B To use the phrase of Latham CJ and Dixon J in the Australian High Court in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 the parties by their course of dealing adopted a 'conventional basis' for the governance of the relations between them, and are bound by it. I care not whether this is put as an agreed variation of the contract or as a species of estoppel. They are bound by the 'conventional basis' on which they conducted their affairs. The reason is because it would be altogether C unjust to allow either party to insist on the strict interpretation of the original terms of the contract when it would be inequitable to do so, having regard to dealings which have taken place between the parties.

The Federal Court in the judgment of Gopal Sri Ram JCA in the case of D *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 345 said:

(The doctrine of estoppel) may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case) or which one party to the contract has represented or E encouraged the other to believe as the true legal effect or meaning.

Lord Justice Laws in the case of *Gloyne v Richardson and another* [2001] EWCA Civ 716 described the above formulation as the doctrine of estoppel by convention when His Lordship speaking for the Court of Appeal said:

F The doctrine of estoppel by convention was explained in this court in *The 'Vistafjord'* [1988] 2 L1 LR 343. Bingham LJ (as he then was) said this at 352:

It is sufficient ... to say that it [sc the doctrine of estoppel by convention] applies where (1) parties have established by their construction of their agreement or their apprehension of its legal effect a conventional basis, (2) on that basis they G have regulated their subsequent dealings, to which I would add (3) it would be unjust or unconscionable if one of the parties resiled from that convention.

[20] Applying that description of estoppel by convention to the present case, H both parties from 1998 until December 2011 when DW1, the son of DW2, returned from Australia, had conducted themselves on the conventional basis that the land available for the development was 72.58 acres and not 80.56 acres since the state government had in early January 1998 given notice to the appellant that 7.98 acres of the said land would be acquired for the LEKAS Highway, as clearly set aside in the layout plans. The appellant would be I estopped by convention to now say that the development plan was for the whole of 80.56 acres of the said land. The evidence is clearly before the court.

DW2, under cross-examination told the court that the terms and conditions of the contract were contained in the JVA and the subsequent supplementary agreement and variations involved only the change of entitlement. There was no dispute until his son, DW1 returned from Australia in December 2011 when he told DW2 that the entitlement of the respondents should be based on 80.56 acres of the said land and hence when the state authority had acquired part of the said land, the respondents' entitlement ought to be reduced proportionately.

[21] Against the overwhelming evidence as shown above, it is wholly untenable for the appellant to allege that the development was mounted on 80.56 acres. The layout plans which were submitted by the appellant and approved by the Majlis Perbandaran Seremban unequivocally buttressed the respondent's contention that the development was mounted on 72.58 acres and not 80.56 acres as alleged by the appellant. We are therefore prepared to accept that there is ample evidence to show that the development was based on the 72.58 acres and not 80.56 acres. But, that is, we should say, how far our finding goes. Whether there was any evidence to show that the respondents' entitlement had been reduced proportionately in accordance with cl 21(c) of the JVA is another pertinent issue which we shall deal when we set out to consider the issue of the plea of set off in due course.

[22] We now turn to the next point that has been pressed on us in this court. It is, we apprehend, the issue of the alleged failure to give the respondents titles to and vacant possession of ten units of low cost flats in phase 1 of the development. By cl 7 of the JVA the appellant undertook to complete the construction of the respondents' units and deliver vacant possession of the same within three years from the date of commencement of each phase of the development. By the appellant's own document, that is, a letter dated 11 December 2008, they had admitted that the date of commencement for phase 1 was 21 March 2001. Thus, the completion date for phase 1 was 21 March 2004. For phase 1, the appellant amongst others was required to build ten units of low cost flats for the respondent. DW2 in his testimony during cross-examination, whilst agreeing on the dates of commencement and completion of phase 1, admitted that the appellant failed to deliver to the respondent the ten units of low cost flats. It is clear as surely as night follows day that by failing to fulfil its obligations under the contract, the appellant was in breach thereof. It failed to deliver ten units of low cost flats on or before 21 March 2004. We would observe that although DW2 made an attempt to rely on purported market conditions as an excuse for the inordinate and inexcusable delay in fulfilling its obligations, no evidence was led by the appellant to support his allegation.

A **[23]** Needless to say, cl 7(d) of the JVA requires the appellant to use its best endeavours to deliver the houses and in the event that the same is not possible due to events beyond the control of the appellant such as market conditions or acts of God the respondents should extend the time frame for delivery of the said flats in accordance with the appellant's request. However, there was no B evidence before us of the so-called market conditions or any request by the appellant for an extension of the completion date and any consensus on the time frame for delivery of the ten units of low cost flats. In any event, the appellant failed to comply with cl 34 of the JVA. The clause stipulates that any notice to be served under the JVA upon the respondent and the appellant shall C be served on them at their respective address first above given and service of any notice pursuant to the JVA shall be deemed to have been served if the same is sent by registered post two days after the date of posting. It is therefore clear that any notice under the contract must be in writing. We find no such notice in writing requesting for an extension of time for the completion date was ever D issued by the appellant to the respondents.

[24] The appellant contended that the respondents were only entitled to a compensation for ten units of low cost flats pegged at RM40,000 per unit and E that since the completion date was on 21 March 2004, the interest rate ought to be compensated at 5%pa. The total sum which comprised the principal sum and interest of 5%pa based on the appellant's calculation amounted to RM631,721.26. We accept that the appellant might be more than willing to pay the sum of RM631,721.46, however it is legitimate to have regard at the F same time to the evidence that they had used the said land to build units of semi-detached or double storey houses or even shop houses and thereby enriched itself at the expense of the respondents who are the owners of the said land. That, in our opinion, would be tantamount to unjust enrichment because the appellant would benefit by his own wilful default. The appellant G ought not to be allowed to benefit from its own wrongdoing. In any event the appellant did not adduce any evidence that would show that the low cost flats ought to be pegged at RM40,000 per unit. The learned judge was right in making an order that the appellant do deliver 1/18th of the number of units of building that would be erected on the land meant for low cost flats by the H appellant within three years failing which the appellant should deliver the remaining portion of the land in phase 1 meant for the low cost flats back to the respondents as the lawful owners. The 1/18th share we would observe, is the ratio of entitlement of 10 units of low cost flats out of a total of 180 units of low cost flats which would be built by the appellant under the JVA.

I

[25] The next issue turns upon the argument urged for the appellant that it had obtained the first respondent's consent to vary the development plan to allow for the 29 units of intermediate town houses in phase 4 to be replaced with the medium cost double storey houses in or around November 2010. It

shall be remembered that for phase 4 development, the appellant, by virtue of the variation letter dated 9 June 2003, agreed that the respondents' entitlement for the said phase amongst others included 29 units of intermediate town houses. However, the appellant built 45 units of double storey terrace houses and two units of semi-detached houses instead of 74 units of town houses. The respondents contended that the appellant had wilfully breached the JVA in building 45 units of double storey terrace houses in phase 4 in place of town houses without their consent and further in selling off 44 units of the double storey houses to third party purchasers in violation of the respondents' entitlement as owners of the said land under the contract. Under cross-examination, DW2, the appellant's managing director agreed that any request for variation must be in writing. DW2 also agreed that under phase 4, originally the appellant was supposed to get 45 units of town houses and the respondents would be entitled to 29 units of town houses thus the total number of units to be built would be 74 units of town houses. But the appellant had built 45 units of double storey terrace houses in place of these town houses. Upon further cross-examination, DW2 admitted that the appellant had not delivered any one of the units to the respondents and that they had sold 44 units out of 45 units to third parties.

[26] The learned Judge correctly found that there was no documentary evidence to substantiate the appellant's claim that the respondents had given their consent or knew about the construction of the 45 units of the double storey terrace houses instead of the 74 units of town houses as agreed. We are satisfied that there was no supplementary agreement nor letter of variation that would prove or support the alleged oral consent as was done in the previous three variations which were agreed upon by both parties. There was additionally, no evidence that would show that the respondents knew about the sale of the 44 out of the 45 units of the double storey terrace houses. The evidence considered in its entirety supports the conclusion that there was no consent by the respondents for the construction of the 45 units of double storey terrace houses. The appellant admitted that the date of commencement for phase 4 was 25 April 2007, ergo the completion date for phase 4 was 25 April 2010. The breach which occurred more than five years ago is irremediable and irreparable as 44 units of the double storey terrace houses have been sold by the appellant to third party purchasers without the knowledge or consent of the respondents. In the event, the respondents are entitled to be compensated in monetary terms. By the appellant's own admission and by virtue of its own documents, the average price of a unit is RM319,732.73. This price was obtained by adding up the selling price of each unit and divided the total price by 44 units sold by the appellant. We could not apprehend why the respondents' entitlement should be confined to 31 intermediate double storey houses as suggested by the appellants since the units built included 14 units of corner lots double storey terrace houses.

[27] As earlier stated, the proportion allocated to the respondents was 29 out of 74 units of town houses, that is, 29 units of town houses for the respondents and 45 units of town houses for the appellant. The ratio is 29:45. Now, in wilful breach of the JVA, the appellant had built 45 units of double storey houses and sold 44 units to third party purchasers. In determining the amount of damages to be awarded to the respondents, the number of units of double storey terrace houses which the respondents were entitled was 17.64 units. This is derived by dividing the total number of units built by the appellant in phase 4, that is, 74 units with the total number of units the respondents were entitled, multiply by 45 units built. Based on the calculation provided by the respondents as tabulated below the amount of compensation payable to the respondents in lieu of 29 units of double storey houses is RM5,640,085.35:

Total selling price for 44 units sold	-	RM14,068,240.00
Average i.e. total selling price divided by total units sold	-	$\frac{\text{RM14,068,240}}{44}$ = RM319,732.73
Ratio	-	29:74
Entitlement (units)	-	$\frac{29}{74}$ x 45 units = 17.64 units (to 2 decimal places)
Compensation/ Principal Sum	-	17.64 x RM319,732.73 = RM5,640,085.35

[28] With interest at 5%pa determined from the completion date of 25 April 2010 until full payment, as at the date of judgment that is 22 October 2015, the amount of interest payable would be RM1,548,383.72. Accordingly, the quantum of compensation inclusive of interest which the respondents were entitled would be RM7,188,469.07. We are of the considered opinion that the calculation based on the above tabulation formulated by the respondents is reasonable and correct.

[29] Learned counsel for the appellant submitted that the restitutionary award ordered by the learned judge had in effect given the respondents a windfall as they got the benefit of the market price of 17 units without having to bear the cost of building them. It was submitted for the appellant that the damages awarded was punitive in nature as not only was the appellant required to return all its gain from the development of the 44 units of double storey terrace houses, the appellant was made to suffer losses of RM4,324,586.44. In dealing with this point, it is necessary to refer to cl 2(a) of the JVA in which it

is clearly stipulated that the respondents' entitlement shall be constructed by and at the sole cost and expense of the appellant. Clause 5(a) thereof states that the appellant shall pay the appropriate authorities the premiums and other dues in connection therewith whereas cl 8 states that the appellant as the developer at its own cost and expense shall apply for and obtain the necessary or requisite consent or approval from the appropriate authorities. Further, under cl 11, the appellant shall at its own cost and expense construct the infrastructure for the development. In addition, the costs of making water and electrical connection to the respondents' units inclusive of all water pipings and electrical wiring and any taxes payable to the relevant authorities in respect of the development shall be borne and paid by the appellant (see cll 13 and 24 of the JVA).

[30] The terms and conditions of the contract as aforesaid fortify the fact that the costs of developing the said land into a housing project shall be borne by the appellant. The appellant as the developer now claims that the respondents must bear proportionately the costs of building the double storey terrace houses. In other words and in effect, the appellant is claiming that the respondents must bear some of the costs of their own wilful breach. The law, in our judgment, does not countenance such a proposition. The respondents must not be punished for the appellant's own wrong. On the contrary, the appellant should not be allowed to benefit from its own breach.

[31] Reference in this connection may be made to the case of *Blue Haven Enterprises Ltd v Tully and another* [2006] UKPC 17 (an appeal to the Privy Council from a decision of the Court of Appeal, Jamaica) wherein Lord Clarke speaking for the Privy Council said in paras 20 and 24 that:

> [20] ... The critical question is not whether Mr Robinson has been enriched at Blue Haven's expense but whether the circumstances in which that enrichment came about place Mr Robinson under an equitable obligation to compensate Blue Haven accordingly ...
>
> [24] ... Enrichment of A brought about by improvements to A's property made by B otherwise than pursuant to some representation, express or implied, by acquiescence or by encouragement, for which A is responsible would not usually entitle B to an equitable remedy. But the reason would be that A's behaviour in refusing to pay for improvements that he had not asked for or encouraged could not, without more, be described as unconscionable.

[32] In *JS Bloor Ltd v Pavillion Developments Ltd* [2008] All ER (D) 381 (Apr); [2008] EWHC 724 (TCC), Her Honour Judge Frances Kirkham expounded the principles as follows:

> at paragraph 8
>
> ... English law denies the mistaken improver, whose improvements have become

A attached to the land, any remedy if the landowner has not acted unconscionably.

at paragraph 9

... The claimant improves the defendant's land, mistakenly thinking that he owns it. The defendant did not request the improvements and, given their nature, they cannot be returned ...

B

at paragraphs 46 and 47

There is no evidence that Pavillion knew or ought to have known that Bloor intended to build or were building the orange road. There is no evidence that Pavillion acquiesced in its construction.

C Once the road had been constructed, Pavillion had no real alternative but to accept it ...

at paragraph 48

... Equity will offer relief to the mistaken improver only where the land owner has acted unconscionably ...

D

[33] In the instant case before this court, the appellant was not a mistaken improver in building the double storey terrace houses in phase 4. The appellant, in wilful breach, built the double storey terrace-houses without the consent of the respondents. A fortiori, the principles enunciated in *Blue Haven Enterprises Ltd v Tully and another* and *JS Bloor Ltd v Pavillion Developments Ltd*, militate against any remedy and relief for the appellant. Equity will not offer relief to the appellant who willfully breached the contract. There is not a shred of evidence to show that the respondents had acted unconscionably. The loss should lie where it falls. In this case, it falls upon the appellant.

E

F

[34] If we might interpose here, a final but an important point needs to be made. The point relates to our earlier finding that the development was based on the 72.58 acres of the said land. We were pressed with the appellant's argument that it had completed and delivered the keys for the 78 units of double storey intermediate terrace houses to the respondents by December 2008, and viewed through cl 21(c) of the JVA, the appellant had given vacant possession of 7.7298 extra units of which the monetary value is RM1,144,847.66. The entitlement ought to have been reduced to 70.2702 units. The appellant accordingly sought to set off this amount against any damages that the respondents would be entitled to.

G

H

[35] The learned judge, in para 4 of the judgment, held that as the appellant's counterclaim had been withdrawn at the commencement of the trial, the argument on the counterclaim by the appellant that the respondents should return the keys to 7.7298 units of double storey terrace houses or pay monetary

I

equivalent of RM1,144,847.65 did not arise. Having perused the appeal records, we are satisfied that the appellant only withdrew its counterclaim in paras 26 and 27 of the amended defence and counterclaim. The appellant's set off plea for the over delivery of 7.7298 units was pleaded in para 22 of the amended defence and counterclaim. For clarity, the said paragraph reads:

> 22. Berdasarkan penerangan di atas terutamanya perenggan 13(e) di atas, Defendan menegaskan bahawa Defendan berhak membuat tolakan sebanyak RM1,144,876.66 terhadap semua tuntutan Plaintif (jika ada dan yang mana dinafikan setegas-tegasnya).

The learned judge however, disregarded the appellant's set off plea after erroneously concluding that it had been withdrawn. The decision on the set off was in our view a serious misdirection as the plea of set off remained part of the appellant's amended defence.

[36] The plea of set off was premised on cl 21(c)(i) of the JVA which stipulates as follows:

> (c) If the acquisition of the Land by the Government is of part of the said Land the Developer shall then decide as to whether to continue with the housing project or to terminate it, depending upon the feasibility thereof:
>
> (i) In the event that the Developer intends to proceed with the Agreement then the Owners' lots shall be proportionately decreased, and the Developer shall be entitled to the acquisition sum awarded in accordance with Clause 21(b)(i) and (ii).

Based on the above stipulation, learned counsel on behalf of the appellant had advanced the most compelling argument that since land measuring 7.98 acres had been acquired by the state authority from the said land, the respondent's entitlement ought to be reduced in proportion to the area of land acquired in accordance with cl 21(c)(i) of the JVA which was found to be 9.91%. The percentage was derived based on the following formulation:

> 7.98 acres ÷ 80.56 acres x 100%.

[37] Thus, the respondents' entitlement of 78 units of the double storey terrace houses, following the acquisition of part of the said land should be reduced proportionately by 9.91% to 70.270 units that is after deducting 7.7298 units from 78 units the respondents were entitled prior to the land acquisition in question. In monetary term, the amount to be deducted from the damages awarded to the respondents would be RM1,144,847.66. We accept this contention as we are satisfied that though the subsequent layout plans after the first plan of June 1996 had excluded the acquired land from the development, there is no evidence to show that the respondents' entitlement

had been reduced proportionately. It is not disputed that the respondents' entitlement was premised on a development area of 80.56 acres. This is very clearly stated in the JVA and the supplementary agreement dated 15.5.2000. The two variation letters of 16 October 2001 and 9 June 2003 contain variations of the terms of the respondents' entitlement agreed by both parties. There is absolutely nothing in these two letters to indicate that such variations were made following the acquisition of part of the said land on 23 June 2003. Although, earlier in our judgment we have stated that the parties conducted their mutual affairs and their subsequent dealings on the conventional basis that the land available for the development was 72.58 acres and the development plan was also for 72.58 acres, we do not find any evidence to indicate conclusively that the respondents' entitlement had been reduced proportionately. We accordingly find merits in the appellant's argument on the issue of the plea of set off.

[38] The respondents had also sought an order for aggravated damages in view of the fact that the appellant had wilfully breached the terms of the JVA not only in building the 45 units of double storey terrace houses but in selling them to third parties without any regard to the respondents' entitlement as owners of the said land. The High Court's award of RM50,000 for aggravated damages is, in our view, very reasonable. In fact DW2 in his evidence told the court that the appellant sold 44 units of the double storey houses by mistake. He candidly admitted that the mistake was his.

CONCLUSION

[39] The judgment of the learned judge ought to be treated with the utmost respect. An appellate court does not normally interfere with findings of fact of a trial judge unless the findings are plainly wrong. This is well-established principle. The respondents are owners of the said land. The appellant is the developer. The JVA was executed in 1995. The respondents had waited for about 20 years before they were constrained to initiate this action. The learned judge, save the issue of the plea of set off, did not err in law and on the fact.

[40] For all these reasons, we are of the view that the appeal should be allowed in part to the extent that the plea of set off is allowed with the sum of RM1,144,847.66 to be set off against the principal sum of RM5,640,085.35 awarded by the High Court as damages to the respondents. We also allow interest of 5%pa on the said set off sum with effect from 15 April 2010 until the date of realisation. Except our order on the set off, we affirm the decision of the learned judge dated 22 October 2015. We make no order as to costs.

Appellant to set off the sum of RM1,144,847.66 against the principal sum of RM5,640,085.35 awarded by the High Court as damages to the respondents allowed and decision of the High Court in all other respects affirmed.

Reported by Ashok Kumar